United States v. CNA Financial Corp., No. 03-35446

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

The case is close, but I am not satisfied that the Alaska Supreme Court would extend the implied insured doctrine to this case. The district court got it right, in my view.

Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc.,[1] upon which the majority relies, is distinguishable because it involved hull insurance, which is casualty insurance, while the case at bar involves liability insurance. In casualty insurance, premiums are ordinarily based on the property rather than its owner, and in the absence of a bad claims history that scares the carrier off, the identity of the owner rarely matters. In liability insurance, on the other hand, premiums and issuance are both highly sensitive to the identity of the insured. Premiums can vary even for such small differences as a teenager going away to college, and carriers sometimes limit issuance to particular classes of insureds. It seems to me

[1] Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc., 682 P.2d 1108 (Alaska 1984).

too big of a jump to assume that the words of Avi-Truck, spoken in a casualty insurance context, apply without limitation to the liability context.

When the Alaska Supreme Court considered the implied insured doctrine in the context of liability insurance, in Olympic Inc. v. Providence Washington Insurance Company,[2] it declined to apply it. Evidently there was no evidence one way or the other in Olympic as to premiums, but the court said "[w]e cannot say as a general rule that such premium rates would not vary were the landlord listed as a named insured."[3]

Olympic distinguishes Alaska Insurance Co. v. RCA Alaska Communications, Inc.,[4] another casualty insurance case, on the ground that the insurer had agreed to insure against fire.[5] In Olympic, the insurer had not agreed to insure against risks attributable to the conduct of the putative implied insured.[6]

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[2] Olympic, Inc. v. Providence Wash. Ins. Co., 648 P.2d 1008 (Alaska 1982).

[3] Id. at 1014.

[4] Alaska Ins. Co. v. RCA Alaska Communications, Inc., 623 P.2d 1216 (Alaska 1981).

[5] Olympic, Inc., 648 P.2d at 1013-14.

[6] Id.

That distinction seems apropos to me because, in our case, the insurer had not agreed to insure against the risks attributable to the United States. An insurer might take a different view of those risks, perhaps because of different litigation risks with the United States, rather than a local Native corporation, as the defendant. An insurer might prefer not to issue insurance to the United States at all because of the greater complexity of transactions with the federal government, and the required involvement of its legal department to assure that all applicable federal laws are satisfied.

As for whether the insurer was getting premiums without providing any real coverage after the amendments to the Indian Self-Determination and Education Assistance Act, for all we know Bristol Bay engages in other activities for which it needs liability insurance, and for those other activities the Act does not substitute the United States as the liable party.

For casualty insurance, insurers issue and charge depending on what they are insuring; for liability insurance, insurers issue and charge depending on whom they are insuring. The difference is too great for me to agree that the Alaska Supreme Court would follow its casualty insurance case, Avi-Truck, in preference to its liability insurance case, Olympic. If the United States wanted coverage

under Bristol Bay's liability policy, it could have contracted for it and policed performance by requiring a copy of the insurance certificate, just as a bank with a mortgage assures that it is covered by a homeowner's fire insurance policy. It did not. I would affirm.